IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 1067 of 1984

For Approval and Signature:

Hon'ble MR.JUSTICE KSHITIJ R.VYAS
and
Hon'ble MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgement? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

THE ORIENTAL FIRE AND GENARAL INSURANCE CO.LTD.

Versus

SUMANLATABEN WD/O DEVENDRAKU MAR JAIN

Appearance:

1. First Appeal No. 1067 of 1984

MR AJAY H. MEHTA for MR RAJNI H MEHTA for appellant

MR MC BHATT for Respondent No. 1-2

NOTICE SERVED for Respondent No. 3-4

CORAM : MR.JUSTICE KSHITIJ R.VYAS
and
MR.JUSTICE K.M.MEHTA

Date of decision: 05-08/07/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE KSHITIJ R.VYAS)

The appellant (original opponent no.3) - Oriental Fire and General Insurance Co.Ltd. has filed the present appeal under Sec.110-D of the Motor Vehicles Act, 1939 ('M.V.Act' for short), challenging the composite judgment and order dated 29th July 1983 passed by the Motor Accident Claims Tribunal (Main), Ahmedabad (Rural), at Narol, Ahmedabad in M.A.C.P.Nos.411 and 412 of 1981. In M.A.C.P.No.411 of 1981, the Tribunal ordered that the original applicants do recover Rs.1,90,000/- from the opponents together with interest at the rate of 6% per annum from the filing of the application till payment or realisation with proportionate costs.

It was further held that the Oriental and Fire and General Insurance Company's liability is limited to Rs.50,000/-. However, it has been ordered that the Insurance Company has to satisfy the award to the applicants under Sec.96 of the M.V.Act and the Insurance Company will have a right to recover the excess amount from the owner of the vehicle.

In M.A.C.P.No.412 of 1981 the Tribunal ordered that the applicants do recover Rs.750/- from the opponents together with interest thereon at the rate of 6% per annum from the date of filing of the application till payment or realisation with proportionate costs.

The appellant Insurance Company has challenged the judgment and award arising out of M.A.C.P.No.411 of 1981 only in the present appeal.

2. The facts leading to filing of the present appeal arising out of M.A.C.P.No.411 of 1981 can briefly be stated as under:

It is the case of the original applicants that on 1st May 1981, at about 8.30 a.m., the deceased was going on a Royal Enfield Motor Cycle and the original applicant no.1 was sitting as a pillion rider on the said motor cycle and they were going towards Ahmedabad. The deceased was driving the motor cycle at a normal speed on the correct side of the road. When they reached near CH-6 traffic circle, they had to take a southward turn. Before enterin g the intersection, the deceased reduced the speed of the motor cycle and from the intersection they were required to take a rightward turn and to proceed ahead on the road leading to Ahmedabad. At that time, they had a push from behind and they saw a motor

Van which dashed with their motor cycle on its back whereupon she fell down on the road and the deceased and his motor cycle were dragged upto a distance of about 50 ft. The front portion of the van had dashed with the back side of the motor cycle and thereupon the present accident had happened. Due to the injuries received by the deceased, he succumbed to the same and died in the hospital. The deceased was a Diploma holder in Mechanical Engineering and was in M.E.S.Defence of India, as Assistant Engineer and was earning a net handsome salary of Rs.1,600/- p.m. It is the case of the applicants that they were depending upon the income of the deceased and they were deprived of the bread winner and, therefore, they have filed the petition claiming compensation of Rs.1,90,000/-.

The opponent no.3-Oriental Fire and General Insurance Company in its written statement at Exh. 22 stated that it was not admitted that deceased was earning Rs.1600/- p.m. It was denied that the accident happened and in that accident, the deceased received injuries. It was also not admitted that due to the injuries, the deceased succumbed to death. The time, place and date of the accident and involvement of the vehicle bearing No.GRS-5674 is also not admitted. It was contended that as the vehicle involved in the accident is a goods career, i.e. Matador Van, the liability of the Insurance Company is limited only to Rs.50,000/- for the claim of the applicants as provided in the M.V. Act and does not exceed than that. It is also not admitted that the driver of the Matador Van gave a clash from behind to the motor cycle and thereupon the motor cycle was entangled and moved 50 ft. It is submitted that there has been a breach of the conditions namely, a condition excluding the use of vehicle for hire or reward as the vehicle is on the date of contract of insurance a vehicle not covered by a permit to ply for hire or reward and that there has been breach of specified condition of policy namely a condition excluding the use of vehicle for a purpose not allowed by the permit under which vehicle is void on the ground that it was obtained by the non-disclosure of a material fact of by a representation of fact which was false in some material particular and, therefore, the opponent Insurance Company is not liable to satisfy applicants' claim. It is not admitted that the applicants suffered damages to the tune of Rs.1,90,000/- and therefore, it was prayed that the petition be dismissed.

3. The parties led oral as well as documentary evidence before the Tribunal. After considering the

same, the Tribunal recorded a finding that deceased Devendrakumar Jain died as a result of rash and/or negligent driving of the Matador Van No.GRS-5674 by the opponent no.1. It is held that the applicants are entitled to recover Rs.1,90,000/- as compensation from all the opponents. The Tribunal further held that Opponent no.3 proves that its liability is limited to Rs.50,000/-. The Tribunal also further held that the Insurance Company failed to prove that the policy is void on the ground of non-disclsoure of a material fact as alleged and that the Insurance Company also failed to prove that it is not liable to be bound by the award as there was a breach of the condition of the policy and the permit.

4. Learned Counsel Mr.Mehta, appearing for the appellant Insurance Company submitted that the Tribunal has committed an error in not considering the fact that the appellant Insurance Company is required to insure only for an overall liability upto the limit of Rs.50,000/- in the case of goods vehicle under Sec.95 of the M.V. Act. In the submission of Mr.Mehta, the Tribunal has found the Company's liability to be Rs.50,000/- and has erred in coming to the conclusion that the third party is entitled to recover from the Insurance Company a larger sum than Rs.50,000/- under the Act and thereafter is entitled to recover an additional sum from the insured. Learned Counsel appearing for the respondents nos.1 and 2 supported the judgment of the Tribunal in toto.

5. In the instant case, the Tribunal, after considering the provisions of Sec.95 and 96 of the M.V. Act, in para 18 of the judgment has observed that the Insurance Company has also provided under the policy under Clause Avoidance of certain terms and right of recovery that nothing in this policy or any endorsement hereon shall affect the right of any person indemnified by this policy for any other person to recover an amount under or by virtue of the provisions of the Motor Vehicle Act, 1939, Sec.96. But the insured shall repay to the Company all sums paid by the Company which the Company would not have been liable to pay but for the said provisions. Therefore, under the policy, it has been provided that whatever sum that the Company has to pay, it has to satisfy the claim of the third party though the Insurance Company has not undertaken the said liability. Still, however, as per the provisions of Sec.96 of the M.V.Act, the Company is bound to satisfy the decree passed in the said proceedings and the Insurance Company under an obligation, i.e. under Sec.96 is bound to

satisfy the decree and will be entitled to recover the said sum from the insured and for that purpose the specific clause has been made and Insurance Company is dutybound to answer all the claims of the third party though it has undertaken to cover liability to the extent of Rs.50,000/- only. In view of this provision of law and in view of the above view of law, the Insurance Company is bound to satisfy the award passed in the present proceedings and therefore, the Insurance Company's liability is to pay Rs.50,000/- and it is dutybound to satisfy the award under Sec.96 of the M.V.Act but is entitled to recover the excess sum from the insured by filing a suit for contribution, if so advised.

The aforesaid finding has been recorded relying on the earlier decisions rendered by the Apex Court in the case of New Asiatic Insurance Company v. Pessumal, reported in AIR 1964 SC 1736. The Constitutional Bench of the Apex Court in its latest decision rendered in the case of New India Assurance Co. Ltd. v. C.M. Jaya, reported in AIR 2002 SC 651, after considering the entire case law on the subject, has now laid down the law with regard to the liability of the Insurance Company. It is held in the said decision that in case of the Insurance Company not taking any higher liability by accepting a higher premium for payment of compensation to a third party, the insurer would be liable to the extent limited under S.95(2) of the Act and would not be liable to pay the entire amount. That was a case where the deceased was riding the pillion seat of a two wheeler when it met with a truck insured by the appellant Insurance Company by comprehensive insurance policy. It was not the case that any additional or higher premium was paid to cover unlimited or higher liability than the statutory liability fixed as found in the term of the policy and copy of the insurance policy produced before the Court shows that the liability of the Insurance Company is limited to Rs.50,000/- in regard to the claim in question. Under the circumstances, the Apex Court held that it necessarily follows that the liability of the Insurance Company is limited to Rs.50,000/. The liability of the Insurance Company was not unlimited merely on the ground that the insured had taken a comprehensive insurance policy.

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6. Learned Counsel appearing for the respondent-claimants submitted that the Insurance Company is liable to satisfy the entire amount and thereafter it

can claim the excess amount from the insured even if its liability is held limited to Rs.50,000/-. In support of his submission, reliance has been placed on the decision rendered by the apex Court in the case of Oriental Insurance Co. Ltd. v. Cheruvakkara Nafeessu and ors., reported in (2001) 2 SCC 491. Considering the facts and circumstances of the case, the Apex Court in para 10 of the said decision, has held that despite holding the liability under the policy limited to the extent of Rs.50,000/-, the Claims Tribunal and the High Court were not unjustified in directing the appellant Company to pay the whole of the awarded amount to the claimants on the basis of the contractual obligations contained in clauses relating to the liability of the third parties and avoidance clause. However, the Claims Tribunal and the High Court were not justified in rejecting the right of the appellant Company to recover from the insured the excess amount paid in execution and discharge of the award of the Tribunal. Accordingly the appeal is allowed by holding that the appellant company is liable to pay the entire award amount to the claimants. Upon making such payment the appellant can recover the excess amount from the insured by executing this award against the insured to the extent of such excess as per Section 174 of the Motor Vehicles Act, 1988.

True, in the aforesaid decision, the Supreme Court while considering the provisions of Sec.96 and 95(1)(b), laid down that it is the duty of insurer to satisfy the judgment against person insured, where liability of insurer is limited. However, the insurer may recover, from insured, payment made in excess of liability, if policy contains avoidance clause to such effect. It is equally true that the aforesaid decision was not cited before the Constitutional Bench. However, the Constitutional Bench in the judgment rendered in the case of New India Assurance Co.Ltd. v. C.M.Jaya (Supra) in no uncertain terms laid down that, "In the case of Insurance Company not taking any higher liability by accepting a higher premium for payment of compensation to a third party, the insurer would be liable to the extent limited under S.95(2) of the Act and would not be liable to pay the entire amount." In our opinion, the law laid down by the Constitutional Bench answers the submission advanced before us. We, therefore, see no merit in the submission advanced by learned Counsel appearing for the respondents-claimants. It is therefore rejected.

In the present case also, it is not the case of the opponents that any additional or higher premium was paid to cover unlimited or higher liability than the

statutory liability fixed. A copy of the Insurance policy produced on the record of the case shows that the liability of the Insurance Company is limited to Rs.50,000/- in regard to the claim in question. Under the circumstances, we are clearly of the opinion that the liability of the Insurance Company is limited to Rs.50,000/- only and therefore, there is no question of directing the appellant Insurance Company to pay the excess sum. In our opinion, since the law laid down by the Apex Court holds the field which is clearly applicable to the facts of the present case, there is no option, but to allow this appeal. We accordingly allow this appeal, by holding that the appellant Oriental Fire and General Insurance Company is liable to pay Rs.50,000/- only with interest at the rate of 6% per annum from filing of the application till payment or realisation with proportionate cost. There shall be no order as to costs.

(Kshitij R. Vyas, J.)

(Kamal M. Mehta, J.)

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